MALAYSIA BUILDING SOCIETY BHD.

v.

LIM KHENG KIM & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-30-86]
8 JULY 1988

CIVIL PROCEDURE: *Judgment in default against 1st defendant obtained - Setting aside of the judgment - Post-judgment interest of 14% allowed - Doctrine of merger inapplicable if independant covenant exists - Interpretation of the guarantee - Liability of guarantor as principal debtor - No necessity to resort to enforcing charge first - Conduct of defendant - Laches - Not bona fide.*

The first defendant together with the second, third & fourth defendant executed a joint & several guarantee whereby in consideration of loan facilities granted to an incorporated company (the borrower) agreed to indemnify the plaintiff the sum of RM1.5 million together with interest, costs, charges and all sums payable in event of default. At the close of the borrower's business on 30 September 1985 monies owing to the plaintiff was RM1,243,859.44. Demands were made on the same day but no response was given. Plaintiff instituted action and on 18 March 1986 obtained judgment in default against 1st defendant. On hearing of the bankruptcy petition on 13 August 1987, Counsel for the 1st defendant turned up and informed Court that an application to set aside the default judgment would be filed. On 9 February 1988, the application was filed on following grounds:

(a) the default judgment was not regularly obtained in that plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff.

(b) that in the alternative if the judgment was regularly obtained he had a good defence on the merits.

Held:

[1] Clause 2.05 appearing in the charge for payment of interest was incorporated by reference into the guarantee agreement. This clause applies to the first defendant as an independant covenant. Where the covenant for payment of interest is not merely ancillary but an independant covenant, it cannot be extinguished in the judgment, doctrine of merger inapplicable and the excess of interest is recoverable. Thus, plaintiff had not entered judgment for a sum in excess of that which was lawfully due to it.

[2] The first letter of demand dated 31 January 1985 was duly served according to Clause 16 of the guarantee and that someone had signed the AR Registered on behalf of first defendant. It is not null and void as the letter dated 19 February 1985 reserved the rights under the charge & guarantee and is not inconsistent.

[3] The second letter of demand was not premature because liability of guarantee was as principal debtor and not surety according to Clause 1 and 13 of the guarantee.

[4] Even though plaintiff had entered the charge executed as security for the loan and sale of the land was still pending, specific provisions in the guarantee and caselaw indicates that plaintiff was not bound to proceed against the security first before enforcing the guarantee.

[5] The first defendant was served personally with the writ of summons and statement of claim. Due to the chronology of events, the first defendant has been guilty of laches and his conduct has not been *bona fide*.

[Application dismissed with costs.]

Cases referred to:
MBF Finance Bhd. v. Malaysia Air Charter Company Sdn. Bhd. & 4 Ors. [1987] CLJ (Rep) 196
A.I.A. Co. Ltd. v. Union Builders (M) Sdn. Bhd. [1973] 1 MLJ 95
International Merchant Bankers Berhad v. Dhanoa Sdn. Bhd. [1988] 1 CLJ (Rep) 193
Popple v. Sylvester [1882] 22 Ch D 98
Sneyd, ex parte Fewings [1883] 25 Ch D 338
London Borough of Ealing v. El Isaac [1980] 2 All ER 548
Lowry v. Williams [1895] 1 Ir R 274
Evans v. Bartlam [1937] AC 473
Barclays Bank v. IRC [1961] AC 509
Ng Yik Seng and Anor. v. Perwira Habib Bank Malaysia Berhad [1980] 2 MLJ 83
Datuk Jagindar Singh & Ors. v. Tara Rajaratnam [1986] 1 MLJ 105
Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani [1985] CLJ (Rep) 41
Duncan, Fox & Co. v. North and South Wales Bank [1880] LR 7 HL 348
Ewart v. Latta [1865] 4 Macq 983
Attwood v. Chichester [1878] 3 QB 722
Ban Huat Seng Co. Ltd. v. Lee Poh Soo [1967] 1 MLJ 145

Legislation referred to:
National Land Code 1965, ss. 256(2), 257(1)(a)
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to :
Fisher and Lightwood's Law of Mortgages, 8th Edn., pp. 531 and 532

For the plaintiff - N.G. Sivanandan (Karin Lim Ai Ching with him); M/s. Presgrave & Matthews
For the defendants - Ooi Teik Hoe; M/s. Ooi Lee & Co.

JUDGMENT

Edgar Joseph Jr J:

Datuk Lim Kheng Kim, the first defendant herein, seeks to set aside a default judgment dated 18 March 1986 entered against him for the recovery of RM1,243,859.44 with interest thereon at the rate of 14% p.a. from 1 October 1985 to date of realisation and costs.

It appears from the statement of claim herein that the first defendant, along with the second, third and fourth defendants, had executed a joint and several guarantee, whereby, in consideration of the plaintiff making or affording loan facilities to an incorporated company ("the borrower"), they had agreed that if the borrower shall in any respect fail to perform any of its obligations, then the defendants as guarantors shall indemnify the plaintiff, the sum of RM1,500,000 together with interest costs, charges and all sums payable by the borrower to the plaintiff.

Other provisions of the joint and several guarantee material to this application were as follows:

Para (c) of the preamble provides:

> The borrowers have applied to the Society for a loan of Ringgit Malaysia One Million And Five Hundred Thousand (RM1,500,000) only (hereinafter referred to as "the said loan") for the purpose of financing the development of the said estate and at the request of the guarantors

the society has agreed to grant to the borrowers the said loan upon the security of a first legal charge of even date executed by the borrowers over the said lands in favour of the society (hereinafter referred to as "the said charge").

Clause 1 provides:

In consideration of the Society having at the request of the guarantors agreed to make the said loan of Ringgit Malaysia One Million And Five Hundred Thousand (RM1,500,000) only to the borrowers the guarantors hereby guarantee jointly and severally as principal debtors and not merely as sureties to the Society the repayment by the borrowers of the said loan together with interest costs charges and all other sums payable by the borrowers to the Society under or pursuant to the said charge and the due performance and observance of all the agreements covenants and undertaking on the part of the borrowers therein contained.

Clause 3 provides:

It is hereby agreed and declared that in the event that the Borrowers shall:

(i) make default in payment of any one or more of the instalments or any part thereof or any interest thereon or other sums of moneys payable under the said charge; or

(ii) fail to make payment of the balance of the moneys owing to the Society after the expiry of the notice of demand provided under the said charge; or

(iii) be wound up whether compulsorily or voluntarily; or

(iv) in any respect fail to observe or perform any of the agreements covenants terms and conditions thereof contained in the said charge or shall commit any breach of its covenants or obligations thereunder

then and in any of such case the Society shall have the right to enforce this guarantee against the guarantors, for the whole amount of the outstanding loan inclusive of all interests costs expenses and charges whether legal costs or other costs incurred in the realisation of the security/securities under the said charge. The Society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantor.

Clause 4 provides:

Any admission or acknowledgement in writing by the borrowers or any person on behalf of the borrowers of the amount of the indebtedness of the borrowers or otherwise in relation to the subject matter of this guarantee or any judgment of award obtained by the Society against the borrowers or proof by the Society in winding-up which is admitted, or any statement of account by the Society certified correct under the hand of any one of the managers or any duly authorised officer of the Society shall be binding and conclusive evidence against the guarantors of amount for the time being due to the Society from the borrowers.

Clause 5 provides:

This guarantee shall be in addition to and shall not be in any way prejudice or affected by any collateral or other security now or hereafter held by the Society for all or any part of the moneys hereby guaranteed nor shall such collateral or other security or lien to which the Society may be otherwise entitled on the liability of any person or persons or corporation not parties hereto for all or any part of moneys hereby secured be in any way prejudice or affected by this guarantee.

Clause 12 provides:

In the event of the Society exercising its right of sale of the said lands or assigning its rights under the charge then and in any such event should the proceeds of such sale or assignment after deducting all the expenses thereof and incidental thereto (hereinafter called "the net proceeds") be insufficient to pay all monies due and owing to the Society by the borrowers,

the guarantors shall, upon demand in writing by the Society, forthwith pay to the Society a sum representing the difference between the net proceeds and the monies then due and owing to the Society.

Clause 13 provides:

Without prejudice to any right of guarantors against the borrowers as principal debtors, the guarantors as between themselves and the Society shall be deemed to be principal debtors and not merely as sureties and accordingly the guarantors shall not be discharged nor shall their liability be effected by any act, thing, omission or means whatever whereby their liability would have been discharged if they had not been principal debtors and in particular (but not by way of limitation) the Society shall have the fullest liberty without effecting this guarantee to postpone for any time or from time to time the exercise of any of the powers conferred by the charge in the event of the Borrowers committing any default in complying with any of the terms and conditions herein contained forebear to enforce the covenants for the payment of principal or interest or any other money or any other covenants agreements conditions or stipulations contained or implied in the charge or any other remedies or securities available to the Society, and the guarantors shall not be released by any exercise by the Society of its liberty with reference to the matters aforesaid or any one of them or by time being given to the borrowers or its successors in title or by any variation in the provisions of the charge or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the guarantors.

Clause 16 provides:

Any notice demand or request required or permitted to be made or given under this guarantee shall be in writing and shall be sufficiently made or given to the guarantors by leaving the same at or by sending it by registered post addressed to the guarantors at the addresses hereinbefore first stated or at their last known addresses and shall in such event be deemed to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post. Any such notice demand or request may be made or given to the Society by leaving the same at or by sending it by registered post to the registered office of the Society as for the time being.

The plaintiff granted the said advances, credits and other banking facilities to the borrowers and the position at the close of business on 30 September 1985 was that the monies owing by the borrower to the plaintiff was RM1,243,859.44.

In the event, the plaintiff demanded from the borrower repayment of the said sum but to no avail. Similarly, the plaintiff also demanded, by its solicitors' letter dated 29 October 1985 sent on the same day, from the guarantors payment of the said sum together with further interest at the rate of 14% p.a. from 1 October 1985 until payment but again to no avail.

Although duly served with the writ of summons and statement of claim aforesaid the first defendant entered no appearance and so on 18 March 1986 the plaintiff obtained judgment against him for the said sum and costs.

On 9 February 1988, that is to say nearly two years after judgment was entered, the first defendant took out a summons in chambers to set aside the default judgment on the following grounds:

(a) that the default judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff;

(b) that in the alternative if the judgment was regularly obtained he had a good defence on the merits.

As regards ground (a), it was contended by Counsel for the first defendant that it was not legally permissible for the plaintiff to obtain judgment for interest at the rate of 14% p.a. for the post judgment period regard being had to the provisions of O. 42 r. 12 of the Rules of High Court in the form it took prior to its amendment by PU(A) 445 dated 29 October 1986, those being the provisions in force on the date when the Default Judgment was obtained. My attention was drawn to the case of *MBF Finance Bhd. (Formerly known as Malaysia Borneo Finance Corporation (M) Bhd.) v. Malaysia Air Charter Company Sdn. Bhd. & 4 Ors.* [1987] CLJ (Rep) 196, a decision of the Supreme Court, which held that the lender was not entitled to interest in excess of 8% p.a. after the date of the order for sale under s. 256(2) of the National Land Code. In so holding, the Supreme Court treated the order for sale as a judgment within the meaning of O. 42 r. 12 of the Rules of High Court which, in the form that it then took, provided that a judgment debt would carry interest at 8% p.a.

I would, at this point, digress somewhat, to remark that in the earlier case of *A.I.A. Co. Ltd. v. Union Builders (M) Sdn. Bhd.* [1973] 1 MLJ 95 the Federal Court took a contrary view; Ong CJ speaking for the Court said at p. 96,

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that s. 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows:
>
> > (c) Thirdly, in the payment to the chargee of *the total amount due under the charge at the time of sale*;
>
> The words in **italics**, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale.

This conflict of authority would seem to have been resolved in the recent Supreme Court case of *International Merchant Bankers Berhad in Dhanoa Sdn. Bhd.* [1988] 1 CLJ (Rep) 193 which appears to have restored, at least by necessary implication, the judgment of the Federal Court in the *A.I.A* case, since it is authority for the preposition that an order for sale under s. 257(1)(a) of the National Land Code is not a judgment debt within O. 42 r. 12, that the doctrine of merger is without application in proceedings under the National Land Code to enforce a charge and the covenated rate of interest continues to apply until realisation notwithstanding the order for sale.

I must now return to the submission of Counsel for the first defendant that it was not legally permissible for the plaintiff to recover judgment for interest at the contractual rate in respect of the post judgment period.

In the present case, the claim for post judgment interest was based upon Clause 2.05 of the charge, an independent covenant, for the payment of interest which reads:

> (a) The Chargors shall pay interest on the loan or any part thereof from time to time outstanding at the rate of fourteen (14%) per annum (hereinafter called "the ruling rate" which expression shall include such other rate as the Society may from time to time by notice in writing stipulate) on monthly rests and such interest shall be paid by the chargors to the chargee by monthly payments the first of such payments to be made on the first day of the month following the disbursement of the loan or any part thereof and subsequent payments to be made on the first day of every succeeding month. Interest shall accrue and be calculated on the basis of the actual number of days elapsed.

(b) Interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the ruling rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum or interest shall equally to such capitalised arrears of interest and to interest on such arrears.

(c) The chargee shall be entitled at any time and from time to time by notice in writing to varying its absolute discretion the ruling rate as from the date specified in the said notice.

(d) The chargors hereby agree and confirm that the chargee shall be absolutely entitled to recover the loan in full from any end finance given to the chargors or for any project undertaken by the chargors.

Now, it is true that Clause 2.05 appears in the charge but it was incorporated by reference into the guarantee agreement (See clauses 1 and 13 reproduced above). Accordingly, Clause 2.05 applies to the first defendant as an independent covenant.

A survey of the relevant cases on this issue shows that where the covenant for the payment of interest is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, the doctrine of merger being inapplicable, and the excess interest is recoverable in personal proceedings. There is plentiful authority to support this proposition and I need no more than refer to some of these.

In *Popple v. Sylveste*r [1882] 22 Ch D 98, the covenated rate of interest was at 7% for "so long as the principal sum or any part thereof should remain due on the security". Fry J enforced the covenated rate of interest holding that the judgment did not effect a merger.

It is true that in *Sneyd, ex parte Fewings* [1883] 25 ChD 338 (CA), Popple was distinguished on the facts, but Fry J said this:

Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant of pay interest so long as any part of the principal should remain due either as a covenant or on a judgment.

In recent times, in *Ealing v. El Isaac* [1980] 2 All ER 548, 551 Templeman LJ said this:

I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment without interest or with a different rate of interest payable thereafter. The merger doctrine, which was upheld by this Court in *Re Sneyd,* may be due to the fact that, in former ages, high rates of interest marked the progress of the individual on the path to perdition; whereas, in this day and age, high interest rates mark the road towards national prosperity.

Merger does not apply where there is an independent covenant nor does it apply to a security.

(Emphasis supplied)

In *Lowry v. Williams* [1895] 1 Ir. R 274 (CA), the mortgagee having obtained judgment for principal and interest accrued, successfully brought a second action to recover interest at the contractual rate in respect of the post judgment period, the Court holding that there was no merger.

The following passages taken from Fisher and Lightwood's *Law of Mortgages,* 8th Edn., pp. 531 and 532, fortify what Templeman LJ (as he then was) says:

> If the mortgage provides for a higher rate, the right to recover the difference between the higher rate and the judgment rate depends on the form of the covenant for payment of interest, and the nature of the proceedings - whether the claim is against the mortgager personally, or is against the mortgaged property.
>
> Where the interest covenant is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, and the excess of interest can be recovered in personal proceedings. A covenant for payment of interest so long as any principal remains due on the security is an independent covenant, since the principal is equally due on the security whether it is owing on the covenant or the judgment. Consequently under a covenant in this form the excess interest can be recovered in personal proceedings.
>
> But in proceedings in which the mortgagee's claim is against the property, the full interest recovered by the mortgage is recoverable whether the interest covenant is independent or ancillary.

It follows, then, that there is no substance in the submission that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to it.

As regards ground (b), it was contended by Counsel for the first defendant, that assuming the default judgment was regularly obtained, his client had a good defence for the four separate reasons mentioned above.

In particular, it was contended that (i) the plaintiff's claim was premature in law, (ii) the plaintiff's claim was misconceived, frivolous and an abuse of the process of the Court, (iii) the plaintiff's claim for interest was misconceived in law and (iv) the guarantee aforesaid was void and of no effect in that the first defendant had been induced to execute the same by misrepresentation on the part of the plaintiff that notwithstanding the terms of the Guarantee, it would only have recourse to the first defendant if, but only, if, it had failed to recover from the borrower the amounts outstanding upon enforcement of the Charge.

In considering this part of the case, I must refer to certain well established principles which must guide the Court.

In *Evans v. Bartlam* [1937] AC 473, Lord Atkin enunciated the principles with which I am now concerned thus:

> Thus Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested, in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court as pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

It was contended that the plaintiff's suit was premature in law because it had not been proved that service of the notice of demand dated 31 January 1985, being Ex. MR 8 to En. 34, addressed to 82H Free School Road, Penang, had been effected on the first defendant.

My attention was drawn to the relevant AR card (En. 7 NR 14) which showed that it had been signed by someone on behalf of an incorporated company known as Material Handling and Engineering Sdn. Bhd., of which two of the three directors were members of the family of the first defendant (See Ex. D1).

I regret I find this submission unacceptable. Clause 16 of the guarantee made express provision for the mode of service of notices or demands and was in the following terms:

> Any notice demand or request required or permitted to be made or given under this guarantee shall be in writing and shall be sufficiently made or given to the guarantors by leaving the same at or by sending it by registered post addressed to the guarantors at **the addresses hereinbefore first stated** or at their last known addresses and shall in such event be **deemed** to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post. Any such notice demand or request may be made or given to the Society by leaving the same at or by sending it by registered post to the registered office of the Society as for the time being.
> (Emphasis supplied)

The "address hereinbefore first stated" in the guarantee was 82H, Free School Road, Penang, which it will be noted, was the address to which the notice of demand was sent. But Clause 16 a notice or demand sent by registered post to that address (which, incidentally, it was not disputed was the last known address of the first defendant) "shall be **deemed** to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post". (Emphasis supplied.)

Now, as Viscount Simons said in *Barclays Bank v. IRC* [1961] AC 509 when referring to the word "deemed", "I ... regard its primary function as to bring in something which would otherwise be excluded."

It makes no difference that the AR card in this case bore the signature of someone ostensibly on behalf of Material Handling and Engineering Sdn. Bhd. No explanation was vouchsafed to this Court as why if this individual was not authorised to receive mail on behalf of the first defendant he had signed the AR card concerned. Indeed, the first defendant had not gone on affidavit to allege that the person who signed the AR card was not authorised to received mail on his behalf.

The submission impugning service of the notice of demand therefore fails.

In the alternative, it was submitted that the notice of demand dated 31 January 1985, was null and void having regard to the contents of the letter dated 19 February 1985 being Ex. B to En. 30.

The notice of demand was in the following terms:

> Mr. Lim Kheng Kim
> 82-H Free School Road
> Penang
>
> Dear Sir,
>
> Re: 1) Letter of Guarantee dated 4 October 1982 (*inter alia*) signed by you in favour of Malaysia Building Society Berhad
>
> 2) Memorandum of Charge dated 4 October 1982 (Presentation No. 14145/82 Jilid 250 Folio 113) over Holdings Nos: 201 and 287, Town of Ayer Itam, Section 1, North East District, Penang by Lim Kheng Kim Sdn. Bhd. in favour of Malaysia Building Society Berhad

We act for and on behalf of Malaysia Building Society Berhad, a company incorporated in Malaysia and having its registered office at No. 13/15 Leboh Ampang, Kuala Lumpur.

Our client has instructed us to refer you to the bridging loan facilities accorded to Lim Kheng Kim Sdn. Bhd. of No. 82-H Free School Road, Penang, in respect of which as an additional security, you together with Ang Kim Hwa, Lim Hun Beng and Lim Hun Kiang executed on 4 October 1982 a joint and several guarantee wherein, *inter alia*, you had covenated to pay to our client all the outstanding due from Lim Kheng Kim Sdn. Bhd. together with interests costs and other charges in the event Lim Kheng Kim Sdn. Bhd. defaults in the repayments.

Despite repeated requests and demands made by our client, Lim Kheng Kim Sdn. Bhd. have neglected to pay the interest owing or any part thereof and had also subsequently ignored out client's demands for the repayments of all outstanding due under the terms and conditions of the memorandum of charge dated 4 October 1982, particulars of which you are well aware of.

At the close of business on 31 January 1985 the principal sum and interest owing by Lim Kheng Kim Sdn. Bhd. to our client under the said charge is Ringgit Malaysia two million six hundred and eleven thousand seven hundred and nineteen and cents twenty (RM2,611,719.20).

We have on behalf of our client made a final demand on Lim Kheng Kim Sdn. Bhd., by way of our letter dated 31 January 1985, a xerox copy of which is enclosed herewith for your attention.

Pursuant to the provisions of the guarantee mentioned above, we are instructed by our client to demand from you, as we hereby do, payment of RM2,611,719.20 together with further interest at the rate of 14% per annum from 1 February 1985 until payment within seven (7) days from receipt of this notice, otherwise our instructions are to proceed to, immediately thereafter, institute legal proceedings against you.

Dated this 31 January 1985.

sgd.
Solicitors for Malaysia Building
Society Berhad, No. 13/15 Leboh Ampang,
Kuala Lumpur.

enc.

c.c. client - Kuala Lumpur.
- Penang

The letter dated 19 February 1985 (Ex. B to En. 30) was in following terms:

M/s. Yahaya, Suthersan & Teja
248 Market Road
Bukit Mertajam
Province Wellesley

Dear Sir,

Project: Project at lots 201 & 287 Air Itam

Subject: Bridging loan

We wish to indicate that our Penang Branch Office received two cheques amounting to RM111,719.20 as interest payment for the months of July 1984 to January 1985 on 12 February 1985.

The loan has been extended to 30 November 1985 subject to the existing charge and Directors Guarantee and subject to

a) The repayment of the principal loan in ten monthly instalments.

b) Interest to be serviced monthly.

c) All legal fees to be borne by the development company.

MBSB has the right to recall the loan if at any time the development company defaults in the terms.

The first repayment is due on or by 28 February 1985.

Yours faithfully,

sgd.
f. Controller
Operations Division

c.c.

Branch Manager
MBSB
Penang

M/s. Lim Kheng Khim Sdn. Bhd.
82-H Free School Road
Penang

Clearly, the letter dated 19 February 1985 was meant to grant, and did in fact grant, an indulgence to the borrowers (whose solicitors it would appear were Ms. Yahaya, Suthersan & Teja) allowing it to pay the outstanding principal of RM1.5 million in ten monthly instalments and interest to be serviced monthly whilst, at the same time, reserving all their rights under the charge and the guarantee. In the event, however, after making instalment payments amounting to RM300,000 for the months of February and March 1985, the borrower did make default and hence a second notice of demand dated 29 October 1985 (see Ex. C to En. 30) was sent to the borrower and all the guarantors including, of course, the first defendant (see Ex. MR9 to En. 34) simultaneously.

In the circumstances, I fail to see how it could be said that the notice of demand (Ex. MR8 to En. 34) was nullified by the letter dated 19 February 1985 (Ex. B to En. 30) there being no inconsistency between the two.

But then Counsel for the first defendant took another point. It was said that the second notice of demand dated 29 October 1985 (Ex. MR9 to En. 34) addressed to the first defendant was premature and therefore bad. In particular, it was argued that the plaintiff should have given at least a seven days' notice of demand to the borrower before proceeding to make a demand upon the first defendant but the evidence was that a second notice of demand was sent to the borrower (Ex. C to En. 30) and all the guarantors, including the first defendant, on the same day, that is to say, on 29 October 1985.

The second notice of demand addressed to the borrower (Ex. C to En. 30) was in the following terms:

Lim Kheng Kim Sdn. Bhd.
82-H Free School Road
11600 Penang

Dear Sirs,

Re: Memorandum of charge dated 4 October 1982 (Presentation No. 14145/82 Jilid 250 Folio 113) over Holdings Nos. 201 and 287, Town of Ayer Itam, Section 1, North East District, Penang.

We act for and on behalf of Malaysia Building Society Berhad, a company incorporated in Malaysia and having its registered office at 11th Floor, Wisma MBSB, No. 48 Jalan Dungun, Damansara Heights, Kuala Lumpur, and we refer to the abovementioned charge over the abovementioned properties created by you in favour of our client to secure all sums of money due and owing to our client by you.

We are instructed by our client that despite repeated requests and demands made by our client to you, you have neglected to pay the interest outstanding or any part thereof and accordingly our client had made demands on you to repay the loan outstanding together with interest accruing thereon, which against you had ignored such requests and demands.

At the close of business on 30 September 1985 the principal sum and interest owing to our client under the said charge is Ringgit Malaysia one million two hundred and forty three thousand eight hundred and fifty nine and cents forty four (RM1,243,859.44).

Take Notice that if you do not pay the sum of RM1,243,859.44 together with further interest at the current rate of 14% per annum from 1 October 1985 till date of payment within seven (7) days from receipt of this notice, our instructions are to proceed to take the necessary steps for purposes of obtaining an order of Court for the sale of the abovementioned properties.

Dated this 29 October 1985.

Sgd.
Solicitors for
Malaysia Building Society Berhad,
11th Floor, Wisma MBSB,
No. 48 Jalan Dungun, Damansara Heights,
Kuala Lumpur.

enc.

c.c. client - Kuala Lumpur
- Penang

The second notice of demand addressed to the first defendant (Ex. MR9 to En. 34) was in the following terms:

Mr. Lim Kheng Kim
82-H Free School Road
Penang

Dear Sir,

Re: 1) Letter of guarantee dated 4 October 1982 (*inter alia*) signed by you in favour of Malaysia Building Society Berhad

2) Memorandum of charge dated 4 October 1982 (Presentation No. 14145/82 Jilid 250 Folio 113) over Holdings Nos. 201 and 287, Town of Ayer Itam, Section 1, North East District, Penang by Lim Kheng Kim Sdn. Bhd. in favour of Malaysia Building Society Berhad

We act for and on behalf of Malaysia Building Society Berhad, a company incorporated in Malaysia and having its registered office at 11th Floor, Wisma MBSB, No. 48 Jalan Dungun, Damansara Heights, Kuala Lumpur.

Our client has instructed us to refer you to the bridging loan facilities accorded to Lim Kheng Kim Sdn. Bhd. of No. 82-H Free School Road, Penang, in respect of which as an additional security, you together with Ang Kim Hwa, Lim Hun Beng and Lim Hun Kiang executed on

4 October 1982 a Joint and Several Guarantee wherein, *inter alia*, you had covenated to pay to our client all the outstanding due from Lim Kheng Kim Sdn. Bhd. together with interests costs and other charges in the event Lim Kheng Kim Sdn. Bhd. defaults in the repayments.

Despite repeated requests and demands made by our client, Lim Kheng Sdn. Bhd. have neglected to pay the interest owing or any part thereof and has also subsequently ignored our client's demands for the repayments of all outstandings due under the terms and conditions of the memorandum of charge dated 4 October 1982, particulars of which you are well aware of.

At the close of business on 30 September 1985 the principal sum and interest owing by Lim Kheng Kim Sdn. Bhd. to our client under the said charge is Ringgit Malaysia one million two hundred and forty three thousand eight hundred and fifty nine and cents forty four (RM1,243,859.44).

We have on behalf of our client made a final demand on Lim Kheng Kim Sdn. Bhd., by way of our letter dated 29 October 1985, a photostat copy of which is enclosed herewith for your attention.

Pursuant to the provisions of the guarantee mentioned above, we are instructed by our client to demand from you, as we hereby do, payment of RM1,243,859.44 together with further interest at the rate of 14% per annum from 1 October 1985 until payment within seven (7) days from receipt of this notice, otherwise our instructions are to proceed to, immediately thereafter, institute legal proceedings against you.

Dated this 29 October 1985.

Sgd.

Solicitors for
Malaysia Building Society Berhad,
11th Floor, Wisma MBSB,
No. 48 Jalan Dungun, Damansara Heights,
Kuala Lumpur

enc.

c.c. client - Kuala Lumpur
- Penang.

My attention was directed to the fact that although the final paragraph of the second notice of demand addressed to the borrower required payment to be made within 7 days from date of receipt, so that it expired at midnight on 7 November 1985, yet the plaintiff had not waited until then before sending the second notice of demand to the first defendant.

In fact, the plaintiff had sent a second notice of demand to both the borrower and the first defendant on the same day, that is to say, on 29 October 1985. To emphasise the point, my attention was also directed to para. 2 of p. 2 of the second notice of demand addressed to the borrower which suggests that a 7 days' notice had been given to the borrower expiring on 7 November 1985 as required under Clause 16 of the guarantee.

Accordingly, it was submitted that the second notice of demand addressed to the first defendant being premature was invalid and so the plaintiff had no cause of action against the first defendant.

I regret I again find Counsel's contention unacceptable for it overlooks the provisions of the guarantee which makes it clear that the liability incurred by the first defendant was as principal debtor and not merely as surety (see e.g. clauses 1 and 13) so that once the borrower

had made default in payment of any one or more of the instalments or any party thereof or any interest thereon or any other sum of money under the charge, the plaintiff as lender, would have the right to enforce the guarantee against the guarantors for the whole amount of the outstanding loan (see Clause 3(1). The giving of seven days' notice to the borrower before the bringing of proceedings against the guarantor, assuming there was such a requirement, was mere surplusage and so was of no consequence.

For these reasons, I would also reject Counsel's submission as regards this part of the case, namely that the notice of demand to be effective must have been issued after 30 November 1985, that is, the date of expiry of the bridging loan (See Ex. A to En. 34).

Then it was said that there was a contradiction as between the plaintiff's letter of indulgence dated 19 February 1985 (Ex. B to En. 30) addressed to the borrower's solicitors (reproduced above) stating that the period of the loan was extended until 30 November 1985 and its subsequent letter dated 15 March 1985 (Ex. MR10 to En. 34) stating that unless the instalment payments for principal and interest were paid by 31 March 1985 action would be taken to recover the bridging loan and interest thereon.

I regard this argument too as unacceptable for it overlooks Clause 3(1) of the guarantee which, as I have already noted, provides that in the event of the borrower making default in payment of any one or more of the instalments or any part thereof or any interest thereon or other sums of moneys payable under the charge, the plaintiff shall be entitled to enforce the guarantee for the whole amount of the outstanding loan inclusive of all interest and costs. Indeed, in the final paragraph of the letter of indulgence dated 19 February 1985 (Ex. B to En. 30) the plaintiff had reminded the first defendant of this particular obligation under the guarantee, when it stated categorically that "MBSB" has the right to recall the loan if at any one time the development company (the Borrower) defaults in the terms".

That concludes my examination of the various attempts by Counsel for the first defendant to impugn the notices of demand.

I must next turn to consider an entirely separate point taken by Counsel for the first defendant.

It was said that the plaintiff having on 12 June 1986 obtained an order for sale of the land, thus enforcing the charge being the security for the loan the subject of the guarantee, and the sale being still pending, the present suit was a useless piece of litigation, especially so since, the land concerned had been valued at RM1.3 million as at 18 March 1988 whereas the default judgment was only for RM1,243,559. On this basis, it was argued that only if the proceeds of sale were insufficient to meet all moneys due and owing by the borrower could recourse be had by the plaintiff to the First defendant as guarantor. To emphasise this point my attention was drawn to Clause 12 of the guarantee (reproduced above) which he said operated as a condition precedent and cited the Federal Court case of *Ng Yik Seng & Anor. v. Perwira Habib Bank Malaysia Berhad* [1980] 2 MLJ 83.

With respect, Clause 12 of the guarantee must be read out in isolation but having regard to the rest of the provisions of the guarantee. In particular, as I have already noted, the guarantors in this case had, by reason of specific provisions in the guarantee, incurred liability as principal debtors and not merely as sureties. Moreover, in the payment of any instalment of principal or interest the plaintiff, as lender, would be entitled to proceed to enforce the guarantee against the guarantors for the whole amount of the outstanding loan, interest and costs. As if to put the matter beyond doubt, the last sentence of Clause 5 provides that "The Society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantors."

There is nothing in the judgment of the Federal Court in the *Perwira Habib Bank* case to suggest that the guarantee there contained equivalent provisions and I would, on this ground, distinguish it. Moreover, I think it is common knowledge that the market conditions which prevailed at the time the *Perwira Habib Bank* case was decided were poles apart from those prevailing at the present time. It was then a sellers' market whereas it is now very much a buyers' market.

If any authority is needed to support the proposition that a judge is entitled to rely on what is common and public knowledge when considering the rise or fall in the value of land, then I would refer to the following passage in the judgment of Lord Keith of Kinkel in *Datuk Jagindar Singh & Ors. v. Tara Rajaratnam* [1986] 1 MLJ 105, 114 col. 1 G to I:

> There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge.

In any event, in *Bank Bumiputra Malaysia Bhd. v. Esah Binti Abdul Ghani* [1985] CLJ (Rep) 41 the Supreme Court had refused to follow the *Perwira Habib Bank* case. Lee Hun Hoe CJ, when speaking for the Supreme Court, having referred to the relevant passage in the judgment of Chang Min Tat FJ in the *Perwira Habib Bank* case said this at p. 43:

> This passage was cited and relied on by the learned judge. It is to be observed that what was stated was merely an *obiter dictum*. It has no bearing to the facts of that case which was concerned merely with the question whether the learned Judge was right to give the appellants conditional leave to defend. The guarantor has no special right to demand that the creditor called upon the principal debtor to pay off the debt before asking the guarantor to pay. At p. 207 of *Law & Practice of Banking*, Vol. 2 by J. Milnes Holden under para. 18-12 it is clearly stated:
>
> > ... it has been suggested that, as soon as the guaranteed debt has become due and before the guarantor has been asked to pay it, he has a right to require the creditor to call upon the principal debtor to pay off the debt.
> >
> > However, the existence of this right has been questioned.

Lee Hun Hoe CJ then went on to refer to other authorities to support the proposition that the lender has the right to sue the guarantors without resorting to the securities; what he said was this:

> The case of *Duncan, Fox & Co. v. North and South Wales Bank* [1880] LR 7 HL 348 involved certain bills discounted by the bank and indorsed by Duncan, Cox & Co. and accepted by Radford & Co. Before the bills became due Radford & Co. stopped payment. The bills were dishonoured, and Duncan, Fox & Co. became liable to the bank. The bank held certain securities from Radford & Co. It was held that the bank should hand over the securities to Duncan, Fox & Co. on payment by them of the balance remaining due to the bank. On this point, *Paget on Banking*, 8th Edn., p. 618 has this to say:
>
> > The real question was whether Duncan, Fox & Co., as indorsers, were entitled to the same rights as sureties on paying the bills; and, save for the words of Lord Watson quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

On the contrary, the right to sue the guarantor without resorting to the securities is clearly recognised by Lord Selborne, and by Lord Blackburn. In the Scottish case of *Ewart v. Latta* [1865] 4 Macq. 983 @ p. 987 Lord Westbury C says:

> Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

Accordingly, this objection also fails.

Finally, in considering an application to set aside a default judgment which has been regularly obtained, the Court can quite properly take into account the conduct of the defendant apart from the question of merits.

In *Attwood v. Chichester* [1878] 3 QB 722, a default judgment entered against a married woman was set aside about one year after it was signed but even so an objection as to lack of promptitude failed because there was no evidence of *mala fide* on her part, Bramwell LJ remarking at p. 724:

> But then has her conduct been *bona fide*? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed? Upon the facts I come to the conclusion that the defendant did not intend to make herself liable in this action: she has not acted *mala fide*, but she has a good and meritorious defence, and the plaintiff must have known that he could not succeed.

And this is what Brett LJ, another member of the Court said at p. 724:

> From the facts before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. After various other proceedings, a summons is taken out to commit the defendant. Now, if it could have been shown that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was.

In *Ban Huat Seng Co. Ltd. v. Lee Poh Soo* [1967] 1 MLJ 145, Ismail Khan, J (as he then was) referred to *Attwood v. Chichester* (*ibid*) and said this:

> The power to set aside a regular judgment however is discretionary and in exercising its discretion the Court may, apart from the question of merits, consider the conduct of a defendant, viz. whether he has been guilty of laches in making the application and his explanation, if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained. (See judgment of Lord Wright in the above case). I am aware of the case of *Attwood v. Chichester* (*ibid*), often cited as the authority for the view that lapse of time is no bar to an application to set aside a default judgment, but this proposition seems to me to be subject to this qualification, viz., that the conduct of the defendant should be *bona fide*.

A perusal of the affidavits in this case shows that the first defendant was served personally with the writ of summons and statement of claim. He then claims that he handed over the matter to his secretary with instructions to hand over all documents to his company's lawyers to deal with the suit but that due to inadvertence and oversight on the part of his secretary, he was unaware that judgment was entered against him until the time he was served with a

bankruptcy notice on 7 November 1986. No confirmatory affidavit by the secretary was filed but, be that as it may, the first defendant further explained that after receipt of the bankruptcy notice he had been and still was negotiating with the directors of the plaintiff company to settle the judgment sum.

Considering that the first defendant is a seasoned businessman, it is impossible to give the slightest credence to his claim that he had left the writ of summons and the statement of claim with his secretary to pass it on to his solicitors to deal with without taking any further interest in the matter. Moreover, his attempts to negotiate a settlement with the directors of the plaintiff company and, that too, after he had received a bankruptcy notice, do nothing to help his defence that he had been induced by misrepresentation by the plaintiff to sign the guarantee.

To resume the narrative of events, following the date entry of default judgment on 18 March 1986, the first defendant was on 7 November 1986 served personally with a bankruptcy notice and a copy of the default judgment. It was only on 23 January 1987 that the first defendant's solicitors wrote to the Senior Assistant Registrar stating that they had instructions to accept service of the creditor's petition. Then, on 13 August 1987, when the bankruptcy petition came on for hearing, Counsel for the first defendant informed the Court that an application to set aside the default judgment would be filed.

However, it was not until 9 February 1988 that the first defendant bestirred himself by filing the application to set aside the default judgment.

Having regard to the chronology of events, I find that the first defendant has been guilty of laches and his conduct has not been *bona fide*.

In all the circumstances, I had no hesitation in dismissing the application and with costs.

Also found at [1988] 2 CLJ 675